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JOHN T. FEY, C

No. 648

In the Supreme Court of the United States

October Term, 1956.

THE YUCHI (EUCHEE) TRIBE OF INDIANS, *ET AL.*,
Below Docket No. 172,
Petitioners,
vs.
THE UNITED STATES OF AMERICA, *Respondent,*

Consoldated with

CREEK NATION, Below Docket No. 21, *Respondents,*
vs.
THE UNITED STATES OF AMERICA, *Respondent,*
THE CREEK NATION EAST, Interpeader,
Below in Docket No. 21,
Respondent.

PETITION for REHEARING

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PETITION FOR REHEARING.

To the Honorable Supreme Court of the United States of America:

Petitioners respectfully petition this Honorable Court for a rehearing in the above entitled cause for the following reasons:

The Court of Claims in the opinion sought to be reviewed affirmed an order of the Indian Claims Commission dismissing the suit of Petitioners.

Herein, we have a circumstance of substantial substance in the interpretation of the Treaties of August 7, 1790,[1] and

1. 7 Stat. 35; S. App., pp. 1-8.

August 29, 1796.[2] Two identifiable groups sued the United States under the Indian Claims Act[3] for the same lands. The suits, because of conflicting interest were consolidated. Petitioners assert that August 9, 1814, their ancestors owned all the communal interest in the lands for which they seek an award. Respondents, The Creek Nation of Oklahoma and the Creek Nation East assert the lands were communal owned by an affiliated group of Indian Tribes, which included the ancestors of Petitioners. The nature of the communal ownership of the lands August 9, 1814,[4] is fixed by the above treaties. It is not disputed herein that if Petitioners prevail their members will participate in equal moieties in the lands for which they seek an award; if the two Nations prevail Petitioners will participate in equal moieties with them in any award.

Ambiguities are found in both treaties caused by the use of words that are commonly used to convey different meanings supplied by the context.

United States v. *Shoshone Tribe*,[5] syllabi 4, 5, gives two rules applying to the interpretation of Indian treaties, which Petitioners urge are precisely applicable to the circumstances herein:

> "4. Treaties between the United States and Indian tribes are not to be interpreted narrowly, as sometimes as may be writing expressed in words of art employed by words of conveyancers but are to be construed in the sense in which naturally the Indians would understand them."

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2. 7 Stat. 56; S. App., pp. 8-17.
3. 60 Stat. 1049; S. App., pp. 32-43.
4. 7 Stat. 120; S. App., pp. 22-27.
5. U. S. v. Shoshone Tribe, 304 U. S. 111-118; Jones v. Mehan, 175 U. S. 1 (1899).

"5. In interpreting a treaty between the United States and an Indian tribe, any doubt between the United States and an Indian tribe, any doubt as to the ownership of lands or minerals or timber on lands reserved to the tribe should be resolved in favor of the Indians."

The purpose of interpreting an Indian treaty is not to rewrite the treaty but to arrive at the meaning intended as it would be understood by uncivilized Indians. Herein it applies with equal justice to each of the two groups. No injustice would then be suffered by applying to the United States and the prevailing group or groups the rule given in syllabus 5.

2. Petitioners, Docket No. 172,[6] sue for Just Compensation. The two Nations sue, Docket No. 21,[7] for value at the time the lands were taken. The different character of the suits creates a great conflict of interest when the two suits were consolidated.[8]

The Commission held in its opinion April 22, 1952,[9] Docket No. 21, that the United States admitted that the lands covered by the cession of August 9, 1814, were owned by the Creek Nation and that they approximated some 21,284,800 to 25,936,901 acres. The opinion granted an interlocutory award to the Creek Nation for the lands of the Lower Creeks who were allies of the United States during the time involved herein, but allowed no award for the taking by the cession of lands of the Hostile and Friendly Upper Creeks. The opinion[10] sought to be reviewed held that any award would be distributed to all the living descend-

6. R. Orig. Papers Dk. 172.
7. R. Orig. Papers Dk. 21.
8. R. Orig. Papers Dk. 21.
9. S. App. Pet. for Cert. 49; 2 Ind. Cl. Comm. 98-114.
10. App. Pet. Cert. 19-37.

ants of the Creek Nation as it was constituted August 9, 1814, including Petitioners, in equal moieties. In other words if Petitioners prevail any award to them will be distributed to their members in equal moieties. If the larger group prevail the award will be distributed to the descendants of all the 47 tribes including Petitioners. Because it limited its award to clause 5 of Sec. 2 of the Claim Act, any award to the larger group would not include the lands of the Hostile and Friendly Upper Creeks, but under the holding their descendants would participate in equal moieties in the award. Petitioners are not so limited in Docket No. 172.

Section 2 of The Indian Claims Commission, *supra*, reads in part as follows:

> "Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; * * * (4) claims arising from the taking by the United States, whether as the result of a treaty or cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * *"

Petitioners urge under other clauses than 5 of the Indian Claims Act[11] just compensation is allowable for the

11. S. App., pp. 32-43; 60 Stat. 1049.

tortious taking of the lands of the Hostile and Friendly Upper Creeks.

The Act of Congress of June 7, 1862,[12] provided for the collection of a direct tax in insurrectory districts. An attempt was made under this Act to confiscate the Arlington Estate of General Robert E. Lee. In *United States* v. *Lee*[13] the Supreme Court held that the military power was not supreme during war, and the effort to confiscate the 1100 acres of the Arlington Estate was held to be unconstitutional. Mr. Justice MILLER, pages 219, 220, 221, said:

> "What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.
>
> "It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority, except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative to deprive any one of life, liberty or property without due process of law, or to take private property without just compensation.
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> • • • • • • • •

12. 12 Stat. 422.
13. 106 U. S. (16 Otto) 196, 27 L. ed. 171.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."

The conclusion stated in the above opinion has been stated in many other opinions[14] of this Court.

The applicable part of Section 10 of the Indian Claims Act, *supra,* reads as follows:

"* * * but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless *fraud, collusion* or *laches* on the part of such organization be shown to the satisfaction of the commission." (Emphasis supplied.)

Petitioners filed[15] their suit a few days before limitations would run on filing. It will be noted that in the event Petitioners' suit is not dismissed by this Court and in the event the two Nations prevail, each of Petitioners' members

14. United States v. Creek Nation, 295 U. S. 103, 109, 110 (1934); Lane v. Pueblo of Santa Rosa, 249 U. S. 110, 113 (1918); Cherokee Nation v. Hitchcock, (1902) 187 U. S. 294, 307, 308.

15. Petition R. Orig. Papers, Dk. 172.

would be entitled to just compensation on their moieties in all the lands taken by the cession of August 9, 1814. That no injustice would be suffered by the two Nations.

Petitioners urge that because their suit is for Just Compensation and that of the Creek Nation of Oklahoma is limited to value at the time taken there is a conflict of interest that entitles Petitioners to conduct their own suit with counsel of their own choosing.

It is Hornbook law that one organization and one lawyer cannot represent conflicting interests is at least constructive fraud.

If Petitioners' suit is dismissed, they will lose their right to urge just compensation or communal interest they are admitted to own, whether for the land they claim or for all the land taken by cession of August 9, 1814.

Conclusion.

For the foregoing reasons, Petitioners respectfully pray that the order of this Court denying their Petition for Writ of Certiorari to the Court of Claims be reheard and vacated and that the Petition be granted.

Respectfully submitted,

J. T. SMITH,
Counsel for Petitioners.

Certificate of Counsel.

The undersigned, J. T. Smith, attorney for Petitioners, hereby certifies that the Petition for Rehearing filed in this cause is presented in good faith, that in his judgment said Petition is restricted to the grounds specified in paragraph 2 of Rule 33 as amended, and that said Petition for Rehearing is not interposed for delay.

J. T. SMITH,
Attorney for Petitioners.

Office Supreme Court,
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JOHN T. FEY, Clerk

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THE CREEK NATION OF OKLAHOMA, *Respondent,*

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THE CREEK NATION EAST, *Interpleader.*
Below in Docket No. 21.

MOTION TO RECONSIDER ORDER DENYING PETITION FOR REHEARING.

J. T. SMITH,
222 Berryhill Building,
Sapulpa, Oklahoma,
Counsel for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES,
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THE UNITED STATES OF AMERICA, *Respondent,*
CREEK NATION EAST, *Respondent.*
Below in Docket No. 21.

MOTION TO RECONSIDER ORDER DENYING PETITION FOR REHEARING.

To the Honorable Supreme Court of the United States of America:

Come now the above named Petitioners and move this Honorable Court to reconsider its Order of March 25, 1957, herein denying the Petition for a Rehearing, for the following reasons:

1. That should said Petition for a Rehearing be reconsidered by the enlarged Court under its procedure the result might be changed.

2. That the order sought to be reconsidered denies the right of Petitioners to present their claim under the Con-

stitution[1] for moieties of their members in all the lands taken by the Treaty cession of August 9, 1814,[2] before the Indian Claims Commission. If their suit is dismissed this right will be lost to them by limitations. To permit Petitioners to present such claim would in no way lessen or detract from the award made to other Indian groups herein who have limited their right in their Petitions to recover for lands held by the Hostile Upper Creeks.

3. The order sought to be reconsidered denies Petitioners' Constitutional right to recover Just Compensation[3] on their members moieties in all the lands taken by the Treaty cession of August 9, 1814. This would in no way lessen or detract from other Indian groups who cannot recover just compensation because of limitation in their petition.[4]

4. The Petitioners sue for Just Compensation,[5] the two Nations for value at the time the Treaty cession was made. This causes a great conflict of interest between the two suits. To permit one organization to represent such conflicting interests is Petitioners believe without precedent in judicial procedure.

5. Petitioners, many of them full-blood Indians, are approximately 1265 in number. Many of them are too poor to procure proper medicine and medical attention for the aged, or educational advantages for many of the younger generation. The distribution of any award under the opinion sought to be reviewed to members of a Creek Nation

1. United States v. Lee, 106 U. S. (16 Otto) 196, 27 L. ed. 171; United States v. Creek Nation, 295 U. S. 103, 109, 110.
2. 7 Stat. 120, S. App., pp. 22-27.
3. U. S. v. Lee, *supra.*
4. R. Pet. of Cr. No. (orig. papers).
5. R. Pet. of Yuchi (orig. papers).

under Article I of the Treaty, 1790, "* * * all the individuals, towns and tribes of the Upper, Middle and Lower Creeks and Seminoles," based on value at the time taken of the lands of the Lower Creeks would be negligible to grant relief to the individual recipient contemplated by the Indian Claims Act. On the other hand if Petitioners' suit is not dismissed the inclusion of their moieties, which cannot be disputed, in the lands of the Upper Creeks with Just Compensation on the whole would be substantial to the Petitioners' members, and carry out the obvious intent of the Indian Claims Act.

Conclusion.

For the foregoing reasons Petitioners respectfully pray that the orders of this Court denying their Petition for Rehearing and for Writ of Certiorari to the Court of Claims be vacated and the Petitions granted.

Respectfully submitted,

J. T. SMITH,

Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

The undersigned, J. T. Smith, attorney for Petitioners, hereby certifies that this motion is filed in good faith, that in his judgment this motion is in furtherance of substantial justice and is permissible under the rules of this Court, and that said motion is not interposed for delay.

....,

J. T. SMITH,

Attorney for Petitioners.